Court of Appeals No. 49087-1-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

CHUNYK & CONLEY/QUAD-C,

Plaintiff/Appellant.

v.

PATTI C. BOETTGER,

Defendant/Respondent.

REPLY BRIEF OF APPELLANT CHUNYK & CONLEY/QUAD-C

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INTRODUCTION

A material fact – and jurisdictional or procedural history -- was withheld from the jury, hampering its attempt to get at the truth. This fact and history was fully considered by the Board of Industrial Insurance Appeals' ("Board"). How can an appeal to the Superior Court be fair if that appellate body is not given same basic, fundamental information the Board had? This is not an evidentiary issue, such as hearsay that a jury cannot process properly, but a finding of fact that explains the context of the issue to be decided by the jury, just like other departmental findings or decisions.

If, as the Respondents argue, only this time-loss period is at issue and thus facts from other time periods are not relevant, then the jury should have not been informed of any prior "fact" or procedural history, including the disabling back injury or the major depression condition. That makes no sense, of course, and neither does it make sense to exclude another fact/condition established previously by a Superior Court jury and then executed by the Department of Labor & Industries ["Department"]).

There are two issues on appeal. First, whether the trial court's exclusion of the material fact that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, the adjacent time-loss period just before the time-loss period at issue here, was an abuse of

discretion. The trial court denied employer Chunyk & Conley/Quad-C's ("Quad-C") pre-trial motion to either admit a prior jury verdict as an exhibit or, more correctly, to amend the Board's Findings of Fact to include the established fact that Ms. Boettger was not temporarily totally disabled on and before October 23, 2006. The trial court also rejected their proposed jury instructions – another method of getting the information to the jury, pursuant to WPI (6^{th}) 155.02.[1] Quad-C moved to allow this information because a prior jury verdict emanating from the same industrial injuries found that Ms. Boettger was not temporarily totally disabled in the time period just prior to her current claim for time loss. Thus, that 2009 jury had already established a fact, which was accepted and executed by the Department. This fact became the law of the case, or at the very least part of the jurisdictional history, and mandated that this second jury be informed of that procedural history and material fact, *which the Board fully considered when they rendered their final Decision and Order.*

The second issue is whether Ms. Boettger failed to present rebuttal evidence that she could not work *part-time*. Rather, the only evidence presented by the claimant (the Department did not participate at trial), was that she could not work *full-time* because of her depression. While Quad-C

[1] Though the trial court rejected this jury instruction to add the Department-accepted fact (not temporarily totally disabled), it allowed another additional Department-accepted fact in a jury instruction submitted by Ms. Boettger ("depression has been determined" and binding). See Section 1. e. hereafter.

presented three medical witnesses who all testified she could work part-time, Ms. Boettger failed to rebut that evidence. Therefore, there was insufficient evidence to uphold the jury's verdict that she was temporarily totally disabled and unable to work at least *part-time*.

The trial court's failure to correct these problems is abuse of discretion and mandate vacation of the jury's verdict and a new trial.

REPLY ARGUMENT

1. The trial court (and the Board) failed to give all the established background findings of fact.

The trial court failed to instruct the jury and failed to amend the Board's "Findings of Fact" to include the accepted, determined fact that Ms. Boettger was not temporarily totally disabled between August 19, 2006 and October 23, 2006. The Respondents argue it is not relevant: "The effects of a work injury can evolve over time. An injury can render a worker temporarily disabled during one period but not another." (Department Brief, p. 1)

Here, however, there was no evidence of evolution or any change in the major depression (accepted condition at issue) – nothing changed from the first period to the second. An injury can evolve or deteriorate, making two time periods mutually exclusive, of course; but here, it did not.

a. The evidence did not show any change in condition from August 2006, unless it was improvement.

The Respondents appear to suggest Dr. Pearson testified Ms. Boettger would "spend the whole day sitting and crying" during the relevant time period. That was not his testimony. Indeed, in testifying about his work with her during her suicidal episode in August 2006 (prior to the time period at issue here), he testified about all her mental health issues, including that she was "tearful" at that time. (CP 517-19) Then, when asked a general question on direct examination about the "criteria for depression", he gave no specific time period and guessed that "she may spend pretty much the whole day just sitting and crying, not being able to get motivated . . . ." (CP 539-40) He was not specific that this occurred during the time period at issue, as opposed to her hospitalization episode in August 2006.

When he was time-specific, going through his medical notes in his testimony, he testified mainly about improvement:

- Nov. 20, 2006 -- Cymbalta "seemed to help" (CP 550); Ms. Boettger "not feeling quite so depressed since last time" (Id.);
- August 2006 to end of 2006 – "depression seems to be improving" (CP 551);
- January 15, 2007 – "functionality" improved (CP 552);
- March 12, 2007 – "depression continues to improve" (CP 553);
- May 7, 2007 – "good month with less pain" (CP 554);

- June 11, 2007 – "depressed again" (*Id.*; suggesting she had been much better);
- 2007 – 2009 – mostly discussion of medical issues, not depression, in the notes;
- November, 24, 2009 – "stable . . . dealing with many problems in a positive way" (CP 557); and
- May 9, 2011 – "Her depression has improved since last time" (CP 558).

Overall, the portrayal in Appellant's opening brief that she was improving during that time period at issue, is extremely accurate. Even if she was "really no better", as Dr. Pearson also testified to, that is not a deterioration, not a change. There was no evidence of any difference or change in her depression condition, from the testimony at both trials, from the 2009 trial (August 19 to October 23, 2006 time period) to the 2015 trial (time period after October 24, 2006). The same evidence at both trials, the same witnesses on the depression issue. (Mr. Gendreau testified on vocation issues, not depression. And, new witness Dr. Schneider testified in favor of Ouad-C, that Ms. Boettger "can perform the physical activities described in the job analysis . . . from a psychiatric standpoint." CP 354)

Indeed, all of that testimony is quite a positive contrast to Ms. Boettger's suicidal breakdown and hospitalization that led to Dr. Pearson counseling her in August 2006. (CP 517). The prior Superior Court jury found that despite that breakdown in August 2006, she was not disabled

and she was employable from August 19, 2006 to October 23, 2006. (CP 87) The point here, is that there was no evidence that her major depression condition deteriorated from the time of that established fact; her condition did not change substantially, except perhaps to improve.

Had the jury in this appeal been properly informed of the Department-accepted fact (employable and not disabled in the prior time period), as the Board was so informed, it would have been in a better, fairer position to determine if and why she was suddenly now not employable. Rather, it was left with the impression that she had been disabled (by the back injury that had bled over to the mental condition) since 1998 or 2004, and that was misleading and wrong. The trial court and the Board left a huge three-month black hole in the factual development right after her breakdown in August 2006 and right before the time period at issue on this appeal. That unexplained gap was improper and unfair to this jury.

b. The case law supports inclusion of <u>all</u> prior Department history.

The cases cited by the Respondents, *Billings* and *Valdez*[2] are the opposite of our situation here. In both those cases, a worker claimed that a finding of temporary disability in a prior period meant disability should be found in a subsequent period. The Board in *Billings* rejected this, of course, because disability benefits are only applicable so long as the

[2] *In re Billings*, No. 70,883, 1986 WL 31854 (Wash. Bd. of Indus. Ins. Appeals, July 1986), and *Valdez v. Department of Labor & Indus.*, No. 33261-6, 2016 WL 4069732 (WA Ct. of App., July 28, 2016)(unpublished opinion, persuasive authority only).

disability continues – if temporary, a worker must prove the disability from the industrial injury continues during the subsequent period. RCW 51.32.090(1). The Board carefully noted the workers must establish evidence of disability and inability to be employed *during that period of time. Billings*, at 3-4.

Here, Ms. Boettger presented no change or deterioration in her "major depression" condition from her status during the prior time period (August 19 to October 23, 2006, the time period the prior jury found she was not disabled and not unemployable). If she was not temporarily disabled during that first time period, something had to happen during the later time period, after October 23, 2006, to cause her to be temporarily disabled. There was no evidence that something happened.

More important, however, is how the Board in that case reported its findings. In *Billings,* **the Board listed the "facts" that the claimant had been temporarily disabled and received time loss in 1978-79 and again later in 1984-85. These were historical facts included in the "Findings of Fact", relevant to the context of that decision; they were not left out because they were from a different time period.** Then, it found as to the time period at issue (1980-84), Mr. Billings was not disabled and not unemployable. *Billings*, at 6. Had that case been appealed, all of those findings would have been given to the jury. *See* WPI (6th) 155.02. There is no precedent for removing Board findings when an appeal is taken to the Superior Court. *See id.*

Here, too, all of the findings and historical facts should have been given to the jury. Indeed, the Board should have included all the Department-accepted facts in its findings in this case, rather than simply ignoring historical, accepted facts. (CP 15-16)

Finally, Ms. Boettger cites the 1973 *Camp* decision of the Board. The principles are fine, but the application to this case is distinguishable. In *Camp*, the Department order stated first that no time loss was awarded for the first time period (June 10 to December 10, 1970), and then that future time periods were prospectively precluded from time loss, as well. The *Camp* Board simply pointed out, in reversing the time loss denial, that each time period required its own evidence of disability for time loss to be awarded. BIIA Dec. 38,035 (1973) The Board did not say that the historical fact of Mr. Camp's condition from June-Dec. 1970 should be excluded from or ignored in future jurisdictional facts or findings. Indeed, as *Billings* shows, such historical findings should be included. Is there any question that if Ms.Boettger had won time loss the first time around that the Department and the Board would have considered and included it in the "jurisdictional history" and historical findings of fact? None. Under *Camp*, the prior finding is not determinative of future time loss, but it is not omitted, either. It provides context.

c. The Jury Instructions included historical facts – except one.

Jury Instruction No. 6 gave the jury the Board's Findings of Fact. These findings included "facts" established by previous Department decisions (not disputed or at issue at the Board):

1. "As a proximate result of the industrial injury, Ms. Boettger suffered a low back condition requiring low back surgery at several levels performed in 2004."

2. "She also suffers from major depression proximately caused by the industrial injury."

3. "As a proximate cause of the industrial injury, the claimant is physically able to perform the job of restorative coordinator for no more than four hours a day, five days a week."

(CP 684-85) These are all decisions the Department had accepted and executed as fact, and were accepted by the Board as a preface to its decision on whether time-loss was appropriate due to Ms. Boettger's major depression condition. As the Respondents admit, such historical facts are necessary to give the Board and the Superior Court jury context. The Board then made a finding as to the issue on appeal – that Ms. Boettger could not obtain and perform gainful employment because of the already accepted "major depression" condition. (CP 16; CP 685)

However, if the Board (and later the jury) can take into account historical facts from Departmental decisions, it must take into account all the historical facts. Certainly the Respondents are not saying it would be proper to delete each of those prior facts because they occurred "during a

different time period". By the same logic, the prior jury finding of fact, which was accepted and executed by the Department thereafter, cannot be omitted or ignored because it comes from a "different time period".

The Respondents object, saying injuries "evolve over time", and thus the prior period is not relevant. On the contrary, the previous "fact" is absolutely relevant in conjunction with the issue of "evolving". Here, there was no change in Ms. Boettger's condition, and thus no evolving – deterioration -- of the injury. If there had been a change, Ms. Boettger would have been trumpeting that deterioration and would have used the prior decision to illuminate that dramatic change, that evolution of the injury, that deterioration of the condition. Bottom line, the jury should have been made aware of the historical fact, not as a directive that they should find a certain way on the new time period, but (1) as filling in the black hole, (2) as putting the depression in context, and (3) as an additional consideration in the defense argument that nothing had changed since the Department made its decision (acceptance of the prior 2009 jury finding and execution of the finding).

d. The Board's consideration of the prior finding of fact should have been noted.

The Board denied Quad-C's request to make the accepted condition a part of the underlying record, but noted it was likely the law of the case and it "can" take judicial notice of it. (CP at p. 367, l. 10 – p. 370, l. 13). Specifically, Judge Wakenshaw said:

> I think, that the law of the case might be that, as indicated, that there was a previous judgment regarding a previous period of time-loss. And, I think, I can take judicial notice of what happened in the superior court case . . . .

(CP at p. 369, ll. 10-16). However, when the Board rendered its final Decision and Order upholding the Department's Order, it ignored the fact that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, completely. (CP 75-87) The Board judge did not say why he ignored it, did not say it was not relevant, did not say it would be misleading to a subsequent fact finder, and did not say why he did not include it in the Findings of Fact. He had no reason for omitting it, but left it our anyway. The Board even refused to later amend the Findings. (CP 26, 36-47)

Despite the Respondents' arguments, we have read the applicable case law again and believe it still applies here. The new time-loss period does not make this a different case. Even the Department accepted and executed the 2009 jury verdict as applicable fact and law of the condition for that time period. "[A] decision rendered on a prior appeal, whether 'right or wrong,' becomes the law of the case." *Greene v. Rothschild*, 68 Wn.2d 1, 9, 414 P.2d 1013 (1966). That decision remains the law of the case unless there is a substantial change in evidence presented in a subsequent appeal. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996), *citing Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988).

Regardless whether the prior fact was the law of the case or simply a historical, contextual fact, it still should have been included. Here, the jury was not properly informed of the "law of this case" or the "fact", however viewed (CP at 87), that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006 – immediately preceding the time-loss period at issue. Even if the trial court decided the fact was not "the law of the case", he could have easily precluded counsel from arguing it was the "law of the case". And, he could have easily given a proper instruction to inform the jury that the findings of fact in Jury Instruction No. 6 (assuming he amended them and included the prior finding of employability) were not intended to be viewed as correct or incorrect. See WPI (6^{th}) 155.02 (this instruction already includes, in the final sentence: "[T]he court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.")

More significant, however, is that to confirm or reverse the Board's decision, the jury must determine whether or not the Board acted appropriately in construing the law and finding the facts. RCW 51.52.115. For the jury to determine whether or not the Board's decision correctly construed the law and findings of fact, the jury must be informed of all the facts that the Board took into consideration. This "fact" was not an evidentiary issue – hearsay or the like. Rather, it was a historical,

jurisdictional, accepted condition – a fact the Department had executed for years.

Specifically, the Board fully considered that Ms. Boettger was found to not be temporarily totally disabled from August 19 to October 23, 2006. The Board considered it as possibly the law of the case: "I think, that the law of the case might be that, as indicated, that there was a previous judgment regarding a previous period of time-loss." The Board considered taking judicial notice: "And, I think, I can take judicial notice of what happened in the superior court case...." (CP at p. 369, ll. 10-14). Though ignored in the Board's "Findings of Fact", the Board knew about this fact and fully considered it. On appeal, the jury should have been given the same privilege. If other, proper instructions were necessary to help the jury put it in context, then the trial court should have done that. Exclusion, in essence rewriting significant history, was improper. *See Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965).

If the "Findings of Fact" from the Board are found to be incorrect, the trial court can substitute its own findings of fact to correct the error so that the jury is properly informed. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). Here, the trial court erred in failing to do so. Both of Ms. Boettger's claims for time loss benefits are *based on the same facts, the same industrial injury, and the same*

depression, just a different time period. While not determinative to the jury, it is information that would help them determine Ms. Boettger's capabilities over the ensuing weeks, months, and perhaps years. The jury should have been given that history.

e. The trial court added another, additional historical fact; it's refusal to give the key fact of employability makes no sense.

The trial court gave an additional historical finding as a fact and an additional conclusion to the jury. It refused to give the key fact of prior employability, but it gave a supercharged version of her depression as an accepted fact. Jury Instruction No. 6, in the Board findings, stated: "She also suffers from major depression proximately caused by the industrial injury." The trial court gave the jury more information about this when it allowed the claimant to persuade him to add Jury Instruction No. 15: "depression has been determined [and] that determination is final and binding and you must accept that it is true." (CP at 694).

Thus, Ms. Boettger not only acknowledged the trial court's ability to add historical information, but requested that the trial court use its authority to amend or add to the "Findings of Fact". If that was proper, then so should the addition of the key fact of employability with her major depression from August 19 to October 23, 2006.

Still, the trial court refused to give the jury the historical finding of the fact that it had been determined that Ms. Boettger was not totally disabled from August 19, 2006 to October 23, 2006. Giving one fact not

included in the Board's "Findings of Fact" but not giving the other was unfair, prejudicial, and error.

2. ***The trial court failed to vacate the jury's verdict because Ms. Boettger failed to present any testimony that she could not work part-time.***

Quad-C's testimony consisted of four witnesses who testified that Ms. Boettger could work *part-time*, which was the issue on appeal. (CP at 506, 277, 351-52). Further, there was evidence presented that a job matching her job limitations and part-time requirements was offered to Ms. Boettger through the testimony of Mr. Forsberg. (*Id.*; CP at 312).

The Respondents argue the merits and weight of such testimony, but they do not and cannot argue that there was rebuttal evidence presented by any provider that she could not work part-time. They argue that the jury could draw a reasonable inference from the testimony (despite the testimony being very clear between part-time and full-time), but cite no authority for this argument. They criticize the job offered to Ms. Boettger (because Quad-C was out of business by 2004), but that is not the issue. The issue is, did Ms. Boettger meet her burden at trial to rebut the clear evidence that she could and should work *part-time* (not totally temporarily disabled). The answer is no.

Rather, Ms. Boettger's only medical witness was her treating psychiatrist, Dr. Michael Pearson, who focused on Ms. Boettger not working on a *full-time* basis. That was not the issue on appeal. He never

testified that Ms. Boettger could not work *part-time* or that she was not able to psychologically perform the tasks of the job offered Ms. Boettger, which she turned down. Therefore, Ms. Boettger's evidence failed to rebut the testimony of Drs. McManus, Williamson-Kirkland, and Schneider - that Ms. Boettger could work *part-time* from October 24, 2006, through September 27, 2010 and was thus employable.

Dr. Pearson, who testified regarding her major depression, testified:

> Q. [F]or the period of October 24th, 2006 through September 27th, 2010, did Patti's depression on a more probable than not basis prevent her from obtaining and performing reasonable continuous *full-time* work?
>
> A. Yes.
>
> ....
>
> Q. Has she recovered enough or reached a point of stability long enough to be able to obtain and perform reasonably continuous *full-time* work?
>
> A. I don't think so.
>
> ....
>
> Q. And did those two diagnoses prevent Patti from being able to obtain and perform reasonably continuous *full-time* employment?
>
> A. Yes.
>
> ...
>
> Q. And if you could tell us in your opinion, your professional psychiatric opinion, what you know, in general you think the psychiatric barriers are for Patti in the able to perform – obtain and perform *full-time* work?

A. [B]oth major depressive disorder and pain disorder interfere with her ability to obtain and perform work.

(CP at p. 522, ll. 20-25, p. 528, ll. 6-9, p. 539, ll. 1-13). Dr. Pearson goes on to explain how Ms. Boettger is affected, but *never testifies about any part-time work limitations*. Moreover, he admits he never told her she should not work. (CP at 558, ll. 11-13).

This falls squarely into CR 59(a)(7), on which the Appellant's motion for a new trial was based:

- There is "no evidence" of part-time limitations.
- There is "no evidence" of total disability found by the jury.
- There is "reasonable inference" of no full-time work only, not part-time.

The jury's verdict was contrary to that evidence. And, because Ms. Boettger failed to meet her burden in showing that she could not perform part-time work, which part-time job had been actually offered, the verdict of "totally disabled" is "contrary to the law". (*Id.*)

CONCLUSION

The jury should have had been provided with substantively the same knowledge that the Board had. The duty of the jury was to determine whether or not the Board decided appropriately in construing the law and finding the facts. Without the same knowledge of the facts – all the facts -- the Board had, the jury cannot perform its function as an

appellate body. The trial court's multiple rulings excluding the important historical and Department-accepted fact from the jury were reversible errors; these abuses of discretion materially affected the jury's ability to place the facts in context and prejudiced Quad-C. Further, the jury incorrectly concluded that Ms. Boettger could not work part-time because Ms. Boettger never produced any rebuttal evidence to support such a verdict.

For these reasons, Quad-C requests that the Court reverse the rulings of the trial court and remand this matter for a new trial.

DATED this 23rd day of February, 2017, at Seattle, Washington.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the date signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, **Reply Brief of Appellant Chunyk & Conley/Quad-C**, by the method indicated below and addressed to the following:

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